MONTANA

Management View

An electronic newsletter for the state government manager from the Labor Relations Bureau

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Gov. Martz reaffirms commitment to labor-management training

The negotiated "4-percent" deal that led to the legislated pay raises for state employees contained more than wages – it also contained a labor-management training initiative. Former Gov. Racicot committed $150,000 (FY 2002-03) in state funding for the initiative last fall, when the state reached the economic settlement with MEA-MFT and the Montana Public Employees Association (MPEA). Gov. Martz reaffirmed the state's commitment to the training initiative in May. She authorized the State Personnel Division to collect money from state agencies that have bargaining units represented by MEA-MFT and MPEA.

The goal of the labor-management training initiative is to coordinate labor relations training and skill development to enhance long-term relationships between state managers and the employees represented by the two participating unions. Its funding will support statewide training in areas such as interest-based bargaining and problem solving, alternative dispute resolution, and effective labor-management committee processes.

The Chief of the Labor Relations Bureau will be responsible for administering the funds, with recommendations from agency managers and personnel directors. A five-member committee made up of personnel

Highlights

directors from the three largest state agencies along with two representatives from the participating unions is currently surveying agencies to identify needs, resources, and priorities. The personnel directors on the committee are Beth McLaughlin from the Department of Public Health and Human Services, Russ McDonald from the Department of Transportation, and Ken McElroy from the Department of Corrections. Questions, comments and suggestions can be directed to any of the committee members or directly to the Labor Relations Bureau. Stacy Cummings at **stcummings@state.mt.us** is staffing that committee. //

Should supervisors be in the bargaining unit?

State court says "no," ending four-year challenge

Montana State Prison's correctional supervisors – or "sergeants," as they're more commonly known – meet the tests for supervisory exclusion under Montana's collective bargaining act. That was the finding by Hearings Officer Joe Maronick in June 1998. The Montana Board of Personnel Appeals adopted Maronick's findings in February 1999. District Court Judge Jeffrey Sherlock also found substantial evidence to support Maronick's findings in April 2001. Case closed.

Montana State Prison employs about 50 sergeants. Like other first-line supervisors in state government, these individuals regularly exercise the kind of supervisory authority envisioned by the Montana legislature when it enacted the Montana Public Employee Collective Bargaining Act in 1973. The legislature recognized the need for the undivided loyalties of those charged with carrying out a state agency's mission on a daily basis, and it recognized that a conflict of interest would arise if supervisors were allowed to be included in the same bargaining unit at the employees they supervise.

The act defines supervisory employees under 39-31-104 (11), MCA, as:

> *…any individual having the authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, having responsibility to direct them, to adjust their grievances, or effective to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.*

The definition embodied under Montana law is essentially the same as that defined under the National Labor Management Relations Act. Both the National Labor Relations Board and the Montana Board of Personnel Appeals have consistently held that "the definition of supervisor and the twelve tests applicable to the term are written in the disjunctive. Thus, the possession of any one of the listed powers is sufficient for exclusion."

Your labor negotiator in the Labor Relations Bureau can assist in reviewing positions for supervisory exclusion and pursuing those exclusions, either informally or by petitioning the Board of Personnel Appeals.

Alternative pay plans

ISD pay project promotes competencies in competitive pay environment

Paying for competencies in a market-based system is the goal of the Information Services Division (ISD) alternative pay plan. The plan offers ISD employees new rewards for demonstrating specific competencies – a blend of knowledge, skills, abilities and behaviors – that aim toward high-quality customer service and organizational success. ISD is in the Department of Administration. The ISD pay plan affects information technology positions in the division.

Division Administrator Tony Herbert said, "We're really excited about the chance to pay people in a way that better reflects our industry and our job market. If we can give good employees more reasons to stay with us, it means great things for our services and products." The division has had recruitment and retention problems since the early 1980s attributable to pay levels. ISD managers completed their planning for competency-based performance management and competency-based pay in April 2000. By the end of the calendar year, employees were being evaluated using the new competency-based tool.

Now the agency has begun the pay implementation, which provides measures and mechanisms for linking performance to pay. About 175 employees are included in the ISD pay plan. About 20 of the positions are unionized, and management has bargained the pay issues for those employees with the union (MEA-MFT). The plan includes new pay ranges and market rates for employees under the broadband system. ISD also has been able to commit that any competency-based pay raises would come in addition to the raises granted by the legislature for the classified pay plan.

The information technology (IT) project dates back to 1997, when representatives from several agencies built a competency model for IT positions. Herbert says the ISD plan is progressing well, and will remain open to periodic review and improvement. "We've come a long way, but we're also just beginning," he says. "This is an exciting opportunity to make some long-term improvements in pay."

To obtain a copy of ISD's alternative pay plan, contact Barb Kain at 444-4605 or **bkain@state.mt.us**.

COMMUNICATING WITH EMPLOYEES

What can you say?

Working in a union environment presents several challenges to managers. Managers are often reluctant to talk with employees regarding certain issues like a "hot topic" in contract negotiations, a union election, or a ratification vote on a bargaining agreement. This article is intended to help state managers understand the legal implications of these discussions. A word of caution: There are important practical and strategic objectives at play as well. You'll also want to consider the effect these discussions may have on the agency's interest in obtaining agreement and on its ongoing relationship with the employees' bargaining agent.

Montana's collective bargaining act provides public employees with the right to bargain collectively through *representatives of their own choosing* on questions of wages, hours, fringe benefits, and other conditions of employment. Public employers are restricted from *interfering with, restraining or coercing employees* in the exercise of those rights. While everyday conversations regarding work often lead to union issues, managers should recognize employee rights and understand what is appropriate to discuss with employees concerning union and bargaining issues.

Key Definitions -

- ***Interference -*** To enter into or take part in the concerns of others.
- ***Coercion -*** To enforce or bring about by force or threat.
- ***Direct Dealing -*** Dealing with employees rather than their exclusive representative.

Our collective bargaining law is silent with respect to an employer's right to speech. The Montana Board of Personnel Appeals and Montana courts, however, rely on the National Labor Relations Act (NLRA) and the National Labor Relations Board (NLRB) for guidance on these matters. The NLRB and the courts recognize that communication by both labor and management permits the fullest freedom of expression and nurtures a healthy and stable bargaining relationship. Under the NLRA, employers have a right to free speech. An employer is free to express views, arguments, opinions, or disseminate information to employees unions, elections, and collective bargaining, so long as communication does not contain *a threat of reprisal or force or promise of benefit.*

That said, establishing the difference between the employer's freedom to speak and *direct dealing* is not always easy. Employers could be guilty of unfair labor practices if they choose to deal with the union through the employees rather than the employees through the union.

Our employees are currently going through a union election to decide whether they should be represented. Can I answer questions about the election process and potential results?

The Montana Board of Personnel Appeals administers union elections for state employees. Board representatives are in a better position to answer employees' specific questions about the election process. They can be reached at 444-2718.

The board will post a notice in the work place that will contain information about the process of voting, the ballot, and election timeframes. Explaining the notice and the process is allowed as long as the information is conveyed in a way that's not viewed as interfering, threatening, promising, or coercive. Avoid statements like "if you vote for a union, we will cut overtime," or, "if you vote for the union, we will give you health insurance."

The union organizer is stretching the truth – can we set the record straight?

Feel free to answer direct questions if you can answer them factually and with neutrality. It is employees' responsibility, however, to wade through the campaign literature and vote based on their educated opinions.

We're currently negotiating a contract with the union. When employees ask, can I discuss management's proposals or provide information to them regarding this process?

Informing employees of management's bargaining position does not constitute an unfair labor practice. It's wise, however, to discuss proposals with employees only after the union has received them.

Can I have a group meeting with employees to handle the frequent questions I've been asked concerning negotiations?

We don't advise holding group meetings to gather a "captive audience" concerning bargaining matters. Although answering the same question repetitively is cumbersome, it's best to deal with the questions individually and only with those who show interest. When numerous questions arise – contact your personnel director or labor negotiator to determine the best method for disseminating accurate and relevant information.

Do I have to inform employees of their rights under the collective bargaining agreement?

No. It's the union's responsibility to advise employees of their rights under the collective bargaining agreement. Most unions enlist and train job stewards from the bargaining unit to field the day-to-day questions. If asked, however, feel free to provide factual information concerning the contract's provision and its application in your work place.

What type of information can we distribute to employees?

Distribution of information is a sensitive issue. Realize that the union is responsible for sharing bargaining, election and union information with the employees they represent. In cases where management feels compelled to share information, it may do so as long as the information is free of interference, coercion and reprisal. Again, it's safer to share information with employees *after* it's been presented to the union. //

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Probationary period extensions -

Managers who are coaching new employees occasionally must consider the question: "Can we extend the probationary period?" The answer to that question (or the steps toward finding the answer) might vary if the employee is covered by a collective bargaining agreement. Some collective bargaining agreements allow management to extend a probationary period and simply notify the union. Other collective bargaining agreements require the union's agreement if a probationary period is to be extended. Furthermore, these requirements aren't always spelled out in the "black and white" language of the contract. Sometimes they are established through unwritten "past practice." The best advice for the manager in this situation is to work with your agency personnel officer, and be prepared (either the personnel officer or manager) to contact the union at some point.

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A 1994 grievance over the extension of a probationary period resulted in an instructive arbitration decision. The Department of Social and Rehabilitation Services in the mid-1990's had a contract with the Montana Public Employees Association – the "MPEA Master Agreement." Between 1990 and 1994, the department had a practice of notifying new employees directly if their probationary periods were to be extended, without consulting the union. The department believed the practice was agreeable to the union based on a conversation a department representative had with the union representative in 1990, concerning a particular employee's extension.

In 1994 the department extended the six-month probationary period of an employee by 60 additional days. The employee had received performance warnings from

management during the first six months of employment. After problems continued during the 60-day extension, management decided to discharge the employee. Management believed the employee was probationary and not entitled to the "just cause" rights of the collective bargaining agreement. The employee grieved. The union maintained the employee was permanent because she had completed a six-month probationary period. The contract said, *"The probationary period shall last for 6 months … The matter of the creation of additional probationary periods may be discussed in the appropriate supplemental(s)."* The supplemental contract in the department did not provide for probationary periods of longer than six months. The union acknowledged the 1990 conversation in which it had agreed to the extension of a probationary period for a particular employee. But the union said it never agreed in 1990 to prospectively and forever give management a green light to extend probationary periods for all future employees without consulting the union. The union argued such decisions must be agreed to on a case-by-case basis.

Arbitrator Dustin McCreary decided in favor of the union – *sort of*. The union won on the issue of whether the employee was entitled to "just cause" rights under the contract. The arbitrator decided the employee successfully completed her probationary period when management kept her employed after six months without consulting the union about an extension. The grievance, however, had a major "timeliness" problem. The employee and/or the union waited too long to advance the grievance at one of the steps of the grievance procedure. There was no evidence management had agreed to extend the time frame for advancing the grievance. Because the employee and/or the union did not adequately follow the grievance procedure, the arbitrator decided he had no jurisdiction to determine whether there was just cause to discharge the employee. Even though the grievance could not advance on the "just cause" issue, the arbitrator's decision provided some instruction in favor of contacting the union whenever management proposes to extend an employee's probationary period.

Unpaid work "furlough" -

A state budget crisis in 1986 and 1987 caused many agencies to make budget-cutting plans to cope with dismal revenue projections and collections. The Department of Justice decided one way to save money would be for employees to take three days off without pay, involuntarily, in Fiscal Year 1987. The days off without pay would be the same for all employees subject to the furlough – a Friday in November (the day after Thanksgiving), a Friday in December (the day after Christmas), and a Friday in April ("Good Friday"). Two separate grievances arose over the plan. The union advanced one grievance in the highway patrol bargaining unit, and another grievance in the motor vehicle registration bargaining unit. Management viewed the three days off without pay as a better alternative to layoffs. The union, however, claimed the three days without pay equated to layoffs because of the reduction in paid hours over the course of the fiscal year. The basis for the grievance, the union asserted, was management had implemented layoffs without following the seniority. The layoff provision in both contracts considered seniority to be a factor in layoffs.

The union also noted that the "regular workday" language in the contract defined a workday as eight hours, and the "regular workweek" was defined as "40 hours."

Therefore, the union claimed, the workday and workweek provisions constituted a guaranteed minimum number of paid hours for employees. *If management needed to cut hours, the union argued, the least-senior employees should have been permanently laid off*. Finally, the union argued, management's plan to implement the unpaid furloughs constituted a "unilateral change" that was subject to bargaining.

Management argued the management rights provision of the contract authorized the employer to relieve employees from duty because of lack of funds and to determine the methods by which governmental operations are conducted, unless the authority is modified or waived in the union contract.

Arbitrator John Abernathy dismissed one of the grievances. He found the definition of a workday or a workweek in a contract is not a guarantee of hours unless the contract contains express language stating that the definition means a guarantee. Abernathy also found that three days off without pay, on a one-time basis, did not constitute a layoff and was within management's rights under the contract. Arbitrator Howell Lankford dismissed the other grievance on virtually the same basis. He found that a three-day furlough without pay was not a layoff. In regard to the union's charge that the three-day leave was subject to bargaining, the arbitrator said such a claim was misdirected. If the union believed the employer had not met its duty to bargain, the arbitrator said, such a claim must be submitted to the Board of Personnel Appeals rather than to arbitration. The arbitrator said he had no authority to decide whether the state had bargained in good faith, because the Board enforces the bargaining statutes, while an arbitrator can only enforce specific language of collective bargaining. //

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/index.htm

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